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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

DERRICK SIMPSON,

Plaintiff,

v.

F. AGATONE, et al.,

Defendants.

Case No. 2:15-cv-00254-RFB-DJA

**REPORT AND RECOMMENDATION**

Presently before the court is pro se Plaintiff Derrick Simpson's Motion for Leave to File a Second Amended Complaint (ECF No. 27).<sup>1</sup>

On October 17, 2018, the United States District Judge assigned to this case adopted the screening order in full as ordered as follows:

- The portion of claim one alleging an excessive force claim will proceed against Officer Spurling;
- The portion of claim one alleging a false arrest claim will proceed against Officer Spurling and Officer Carter;
- Simpson's Fifth Amendment claim (claim two) against Officers Carter, Spurling, Hatchett, Thomas, Agatone, Maldonado, and Clark County are dismissed, with leave to amend;
- Simpson's Thirteenth Amendment claim (claim three) against Clark County and the Las Vegas Metropolitan Police Department are dismissed, without leave to amend;
- Simpson's Sixth Amendment claim (claim four) against Clark County is dismissed, with leave to amend;

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<sup>1</sup> Although filed one day late, the Court will screen the instant Motion on the merits.

- 1       • Simpson’s Eighth Amendment claim (claim five) is dismissed, without leave  
2       to amend;
- 3       • Simpson’s Fourteenth Amendment claim (claim six) against Spurling, Carter,  
4       Maldonado, Hatchett, Agatone, Thomas, the LVMPD, and Clark County is  
5       dismissed, with leave to amend; and
- 6       • This case is dismissed as to Naphcare for failure to state a claim, with leave to  
7       amend.

8       (ECF No. 20). Based on this order, these are the operative claims in this case.

9       Simpson filed a Second Amended Complaint on August 23, 2019 (ECF No. 27), which  
10      the Court will now screen. In screening the complaint, a court must identify cognizable claims  
11      and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be  
12      granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.  
13      § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard  
14      for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*,  
15      668 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain  
16      sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”  
17      *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints  
18      and may only dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts  
19      in support of his claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908  
20      (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

21      In considering whether the complaint is sufficient to state a claim, all allegations of  
22      material fact are taken as true and construed in the light most favorable to the plaintiff. *Wylar*  
23      *Summit P’ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).  
24      Although the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff  
25      must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
26      544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*  
27      Unless it is clear the complaint’s deficiencies could not be cured through amendment, a pro se  
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1 plaintiff should be given leave to amend the complaint with notice regarding the complaint's  
2 deficiencies. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

3 Preliminarily, Plaintiff's Count One appears to attempt to state a claim under the Fourth  
4 Amendment with nine subparts including: unlawful stop, excessive force, unreasonable search  
5 and seizure, false arrest, malicious prosecution, false imprisonment, and unlawful seizure.  
6 However, the Court's screening order did not provide Plaintiff with leave to amend a Fourth  
7 Amendment claim. More significantly, the nine subparts of his alleged claim are largely  
8 repetitive of the two Fourth Amendment claims he is already permitted to proceed on under claim  
9 one of the Amended Complaint – excessive force and false arrest. Therefore, as Plaintiff was not  
10 given leave to amend his Fourth Amendment claim and his factual allegations are duplicative of  
11 two claims on which he is already been permitted to proceed, it is hereby recommended that his  
12 additional Fourth Amendment claims in the Second Amended Complaint be denied without leave  
13 to amend.

14 As for Plaintiff's Count Two, it appears to attempt to state a claim under the Fourteenth  
15 Amendment for violation of his due process rights with twelve subparts including: unlawful stop,  
16 excessive force, unreasonable search and seizure, denial of medical attention, false arrest,  
17 malicious prosecution, false imprisonment, and unlawful seizure. The thrust of Plaintiff's claims,  
18 in the Amended Complaint and the proposed Second Amended Complaint, is that Defendants  
19 violated his rights when he was arrested by smacking his head getting into the patrol car,  
20 subjecting him to a search incident to arrest, injected him with some unknown substance while  
21 strapped to a chair, and held him in CCDC illegally after Officers Spurling and Carter made false  
22 statements.

23 As outlined in the Court's Screening Order (ECF No. 16), Plaintiff repeats the same  
24 allegations in the proposed amendment, which fail as a matter of law. For example, "[a] local  
25 governmental entity may be sued under section 1983 where the alleged constitutional deprivation  
26 was inflicted pursuant to an official policy or custom." *Arpin v. Santa Clara Valley Transp.*  
27 *Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658,  
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1 690–91 (1978)). Plaintiff does not allege that the incidents surrounding his arrest and  
2 incarceration were pursuant to an official policy of the LVMPD or the County.

3 Also, the substantive component of the Fourteenth Amendment’s Due Process Clause  
4 prohibits the government from depriving a person of life, liberty, or property in a way that  
5 “interferes with rights implicit in the concept of ordered liberty.” *Engquist v. Or. Dep’t of Agric.*,  
6 478 F.3d 985, 996–97 (9th Cir. 2007) (citation omitted). To succeed on a substantive due process  
7 claim, a plaintiff must show a liberty or property interest protected by the Constitution. *Id.* Here,  
8 Plaintiff has not alleged that he is a member of a suspect class or indicated that his claims involve  
9 a fundamental right. Thus, a rational basis review is appropriate. After a thorough review of all  
10 of the factual allegations in Plaintiff’s proposed amendment, he fails to state a valid substantive  
11 due process claim upon which relief may be granted.

12 Moreover, the Fourteenth Amendment protects against the government’s interference with  
13 “an individual’s bodily integrity.” *Armendariz v. Penman*, 75 F.3d 1311, 1319 (9th Cir. 1996)).  
14 Government officials are justified in using force, including deadly force, in carrying out  
15 legitimate governmental functions. *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 882 F.2d  
16 1398, 1408 (9th Cir. 1989). However, if the force is “excessive, used without justification or for  
17 malicious reasons, there is a violation of substantive due process.” *Id.* The force Plaintiff alleges  
18 was used does not satisfy the requirements for excessive force under the Fourteenth Amendment  
19 and his factual allegations are the same for the Fourth Amendment excessive force claim that he  
20 has been permitted to proceed on.

21 A pretrial detainee’s claim of denial of the right to adequate medical care under the  
22 Fourteenth Amendment is analyzed under an objective deliberate-indifference standard. *Gordon*  
23 *v. Cty. of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018). The elements of such a claim are: “(i)  
24 the defendant made an intentional decision with respect to the conditions under which the  
25 plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious  
26 harm; (iii) the defendant did not take reasonable available measures to abate that risk, even  
27 though a reasonable official in the circumstances would have appreciated the high degree of risk  
28 involved—making the consequences of the defendant’s conduct obvious; and (iv) by not taking

1 such measures, the defendant caused the plaintiff's injuries." *Id.* at 1125. "With respect to the  
2 third element, the defendant's conduct must be objectively unreasonable, a test that will  
3 necessarily 'turn[ ] on the facts and circumstances of each particular case.'" *Id.* (quoting *Castro*  
4 *v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016)). A plaintiff must "prove more  
5 than negligence but less than subjective intent—something akin to reckless disregard." *Id.* The  
6 mere lack of due care is insufficient. *Id.* Plaintiff has not alleged facts to support a claim of  
7 deliberate indifference to his serious medical needs because he has not asserted any actions that  
8 contravened a physician's orders or that officers knew of and disregarded an excessive risk to his  
9 health. Further, again Plaintiff has failed to state sufficient facts to identify the involvement of  
10 Naphcare to warrant adding it as a party.

11 Given Plaintiff's failure to cure the pleading deficiencies, the Court will recommend that  
12 leave to amend these Fourteenth Amendment claims be denied as a futile attempt to reinstate  
13 claims that the Court previously dismissed giving Plaintiff the opportunity to amend.

#### 14 RECOMMENDATION

15 IT IS THEREFORE RECOMMENDED that this case proceed on the operative Amended  
16 Complaint claims as outlined in the Court's Order (ECF No. 20) and Plaintiff's Motion for Leave  
17 to File a Second Amended Complaint (ECF No. 27) be **denied**.

#### 18 NOTICE

19 This report and recommendation is submitted to the United States District Judge assigned  
20 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation  
21 may file a written objection supported by points and authorities within fourteen days of being  
22 served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely  
23 objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d  
24 1153, 1157 (9th Cir. 1991).

25 DATED: January 7, 2020.



26  
27 DANIEL J. ALBREGTS  
28 UNITED STATES MAGISTRATE JUDGE